

2009

Anderson v. Thompson : Reply Brief

Utah Court of Appeals

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Bruce L. Richards, Dean A. Stuart; attorneys for appellee.

David J. Friel; attorney for appellant.

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	3
ARGUMENT 1.....	4
ARGUMENT 2.....	8
ARGUMENT 3.....	11
ARGUMENT 4.....	12
ARGUMENT 5.....	16
CONCLUSION.....	16
CERTIFICATE OF MAILING.....	17

TABLE OF AUTHORITIES

Cases:

	<u>PAGE</u>
<u>Cache County v. Beus</u> , 128 P. 3d 63, 539 Utah Adv. Rep. (Ut. App. 2005), <u>Cache County II</u>	9, 10, 13
<u>Glew v. Ohio Savings Bank</u> , 181 P. 3d 791.....	13, 14
<u>Oliekan v. Oliekan</u> , 147 P.3d 464, 471, 562 Utah Adv. Rep. 15 (Ut. App. 2006)	6, 13
<u>Slattery v. Covey & Co.</u> , 857 P. 2d 243 (Ut. App. 1993), Slattery I	8, 9, 10, 13
<u>Slattery v. Covey & Co.</u> 909 P. 2d 926, 929 (Ut. App. 1995), Slattery II	8, 9, 10, 13
Utah Code Section 30-3-10(2)(2007).....	4

APPELLEE'S ARGUMENT POINT #1

THE THIRD DISTRICT COURT
CORRECTLY FOLLOWED THE COURT
OF APPEALS REMAND BY
CONSIDERING ATTORNEYS' FEES
BOTH AT THE TRIAL COURT AND
APPELLATE COURT LEVEL

APPELLANT'S REPLY

There is absolutely no argument that Thompson prevailed in his second appeal which was decided by the Utah Court of Appeals in its decision rendered on May 15, 2008. The breadth and scope of the remand directives as ordered by the Utah Court of Appeals is the central issue of this appeal.

On remand, the Utah Court of Appeals specifically stated in appeal #2 that, "Because we reverse on the issue of contempt, we reverse the award of attorney fees and costs to Wife, which award was based on the holding of contempt. Likewise, there is no basis to grant Wife's request for an award of attorney fees and costs on appeal. Husband argues that with a reversal, he should be awarded his attorney fees and cost below. Utah Code section 30-3-3(2) provides that "in any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense, Utah Code Ann. 30-3-3 (2) (2007). Accordingly, we remand to the district court to

determine if an award of costs and attorney fees should be awarded to Husband and, if so, to determine the amount” (Record @ 555).

Anderson argues that the specific remand from the Court of Appeals was clear in its directives stating that, “Husband argues that with a reversal, he should be awarded his attorney fees and costs below”. The focus should be on the word below. This should be considered in stark contrast to the specific directives the Utah Court of Appeals set forth in Anderson I (See Addendum 4 of Appellant’s Brief) wherein the Court gave the trial court instructions stating, “if the trial court determines that it can enter sufficient findings of fact to support such an award, the Court may also grant Wife her attorney fees on appeal” (Record @ 482).

Anderson prevailed in appeal #1. Her attorney fees for trial and appeal #1 were awarded and are not at issue in this appeal. Thompson prevailed in appeal #2. The main issue for appeal #3, this appeal, is whether the trial court committed error in awarding Thompson his appellate attorney fees in appeal #2.

Thompson’s assertion that the trial court correctly followed the Court of Appeals remand in considering attorney fees and costs both at the trial court level and appellate court level is incorrect. To follow remand directives from the Utah Court of Appeals the trial court would of necessity need to have been directed to examine Thompson’s appellate attorney fees and costs.

Thompson claims that the trial court correctly followed the remand directives of the appellate court. Thompson’s claims fail if a comparison is made between the

directives of the Utah Court of Appeals in appeal #1, wherein the appellate court told the trial court that it could consider awarding Anderson her trial court and appellate attorney fees and the Court of Appeals directives in appeal #2, which focused on Thompsons request that, “he should be awarded his attorney fees and costs below.” Anderson contends that the trial court went beyond that scope of the remand as directed by the appellate court.

Thompson cites Oliekan v. Oliekan, 147 P.3d 464, 471, 562 Utah Adv. Rep. 15 (Ut. App. 2006) as “the standard for awarding attorney fees on appeal”. Thompson’s reliance on Oliekan is misplaced however. In the remand directives from appeal #2, the appellate court references Thompson’s request for fees below. Likewise, the two important operative words from the Oliekan opinion as referenced by Thompson are “generally” and “we”. Generally does not mean always. More important is the word “we”. This word identifies that it is within the appellate courts discretion to make the decision as to appellate attorney fees. Previous caselaw supplied by Anderson in her initial brief supports this conclusion.

Another extremely important issue to be considered in this same vein of thought is whether Thompson adequately or properly put the Utah Court of Appeals on notice that he was seeking his appeal attorney fees when he filed appeal #2.

Thompson claims in his argument point #1, page 11, that attorneys’ fees on appeal were requested. Thompson refers to his statement which is the last sentence of his initial brief prior to the conclusion section wherein he states,

“Respondent is also entitled to his attorney fees and costs of appeal”. Thompson’s exhibit verifies this on page 28 (Addendum 2 of Appellants brief).

Interestingly enough, Thompson’s statement is not a request or prayer of relief. Simply put, Thompson CLAIMS he is entitled to his appellate attorney fees. Thompson’s initial brief is controlling regarding what his request for relief is from the appellate court. He did not ask for specific relief of his appellate attorney fees. He told the Utah Court of Appeals in the last sentence of a 28 page initial brief that he is entitled to appeal attorney fees. This is a far cry from the claims that Thompson is now making that the Utah Court of Appeals consider awarding him appellate attorney fees and costs and that he had been requesting them all along.

Thompson also claims in his Reply Brief for appeal #2 that he also requested appeal attorney fees (see Addendum 3 of Appellee’s Brief). Once again, Thompson’s claim is made in error. Similar to Thompson’s first claim, the last four words of the conclusion “including fees on appeal” are part of a statement, not a request for relief. Therefore, Thompson’s assertion must fail. Obviously, the Utah Court of Appeals did not interpret these statements (which seem as mere afterthoughts on Thompson’s part) as a proper request for relief. That is why it is Anderson’s position that the Court of Appeals specifically delineated that Thompson had requested that attorney fees incurred BELOW be dealt with in the remand.

Thompson’s final paragraph at point one of his argument (page 12) exposes the weakness of his overall proposition. His argument point #1 is that the trial court

followed the remand directives of the appellate court. However, in the final paragraph of this argument Thompson suggests that, “the remand instructions should be read to require a determination of the amount for attorney fees for Thompson at both the trial court and appellate court levels”.

If the remand directives issued by the appellate court are subject to interpretation and should be read a certain way, how can Thompson claim that he followed an ambiguous directive? Therefore, Thompson’s claim is not made in good faith.

APPELLEE’S ARGUMENT POINT #2

THE DISTRICT COURT ON REMAND
HAD AUTHORITY TO ADDRESS THE
ATTORNEYS’ FEES AND COSTS AT
THE TRIAL COURT AND APPELLATE
COURT LEVEL

APPELLANT’S REPLY

Thompson claims that Anderson incorrectly analyzes the Utah Court of Appeals decisions in Slattery v. Covey & Co. 909 P. 2d 926, 929 (Ut. App. 1995) hereafter referenced as Slattery II, and its companion case of Slattery v. Covey & Co., 857 P. 2d 243 (Ut. App. 1993) hereafter referenced as Slattery I.

Slattery I is exactly on point with appeal #2 in this case in that the appellate court declined to specifically address the issue of whether the trial court could consider awarding appellate attorney fees. In fact, the appellate court decision in Slattery I, footnote 4, could readily apply in appeal #2 of this matter because the

appellate court elaborated in Slattery I that, “Because Slattery does not present any argument to support her request for fees on appeal, we decline to address the issue”. As fully set forth in the prior argument response, Thompson never in fact properly raised the appellate attorney fee issue in his appeal or presented any argument!

Thompson also claims that Anderson’s reliance on Cache County v. Beus, 128 P. 3d 63, 539 Utah Adv. Rep. (Ut. App. 2005) hereafter, Cache County II, is in error based upon the facts and circumstances of the case. The issue set forth in Cache County II that Anderson relies on is enumerated in footnote 7, wherein the appellate court stated that, “the trial court had no discretion to award Cache County the attorney fees it incurred on appeal in Cache County I”.

In fact, the appellate court in Cache County II set forth its reliance on the various rulings it had entered in the Slattery cases.

Thompson claims in his argument at point 2 of the title section that, “The district court on remand had authority to address the attorney’s fees and costs at the trial court and appellate court level”. What is difficult to understand about this argument is that the same problem arises as in Thompson’s argument point #1. These are mere assertions that are set forth by Thompson and there are no supporting claims, statements, affidavits, caselaw, or anything else to support these bald assertions. Thompson must prove and deliver on these assertions if there is to be any merit to his claims. Thompson attempts to refute the several cases cited by

Anderson without providing any back up to his claim that the district court “had authority”.

Further, even if Thompson was correct in his claims that Anderson relied in error on Cache County or Anderson incorrectly analyzed Slattery, the fact remains that the key doctrine and principles that the appellate court set forth in the various Slattery and Cache County opinions, is valid binding caselaw that has not been refuted by Thompson and that should be extrapolated and used as a basis for this appeal.

Finally, Thompson attempts to mislead the appellate court by claiming in the last paragraph of his brief at page #18 that, “. . . the cases cited by Anderson do not support her position that the trial court acted in opposition to the mandate of this Court.” This statement implies that there was a specific mandate from the appellate court in appeal #2 regarding Thompson’s appellate attorney fees. Anderson clearly pointed out in page #12 of her initial brief and page #8 that there was no specific reversal or remand directives from the appellate court relating to the appellate attorney fee issue. It was possible with there being no specific directive, that silence on the part of the appellate court may be construed as a non-decision from the court.

Interestingly enough, if the appellate court had not given specific remand directives to the trial court in appeal #1, under Thompson’s current theory, Anderson would still be entitled to appellate attorney fees in appeal #1 even without a specific remand directive.

APPELLEE'S ARGUMENT POINT #3 - MANDATE DOCTRINE

THE MANDATE DOCTRINE DOES NOT
APPLY TO CIRCUMSTANCES IN
WHICH APPLICATION OF THE RULE IS
ERRONEOUS

APPELLANT'S REPLY

Thompson analyzes in this section of his brief the mandate doctrine or law of the case doctrine even though this issue was not raised by Anderson in her initial brief. Thompson elaborates on why the mandate doctrine should not apply in this case and lists several supporting cases to prove that if the mandate doctrine is applied, it would be erroneous.

What is critical to understand from point #3 of Thompson's argument is the evolving nature of Thompson's arguments. In argument point #1 Thompson claimed that the trial court "correctly followed the court of appeals remand." In argument point #2, Thompson claims that, "the district court had the authority to address attorney fees and costs at the trial court and appellate court level". Both of these assertions were not supported by argument or caselaw. They were very similar to the bald assertions made by Thompson when "claiming" that he had alerted the appellate court that he was seeking appellate attorney fees in appeal #2. Next, Thompson admits in his brief that, "the remand instructions should be read to require a determination of the amount for attorney fees for Thompson at both the trial court and appellate court level".

Thompson is hinting that the remand directives need some interpretation and is further exposed in point #3 of Thompson's arguments when he stated that, "the trial court acted within the scope of the remand..." and also that the remand for attorney fees was entered "without limitation".

These numerous claims and continuous requests by Thompson to view the remand directives in several different ways reveal the ever-changing nature of Thompson's argument. Thompson's final attempt to change his argument occurs when he describes the remand on page 20 of his brief, first full paragraph, stating that "the remand to the district court for consideration of attorneys fees involves at least a matter left open by the Court." This leads one to wonder if Thompson is advocating that the remand was specific or was it left open for interpretation or were there no limitations or was the remand within a certain scope. This analysis leaves one pondering if Thompson's arguments have a feel for that of a chameleon effect.

APPELLEE'S ARGUMENT POINT #4 HARMLESS ERROR

THE TRIAL COURT ERRED IN
AWARDING THOMPSON'S
ATTORNEYS' FEES ON APPEAL
WITHOUT A SPECIFIC REMAND, THIS
ERROR WAS A HARMLESS ERROR

APPELLANT'S REPLY

Thompson claims in his argument, point #4, that if the trial court erred in its award of appellate attorney fees to Thompson, the error was harmless. Thompson makes this assertion that the harmless error doctrine should be applied by the

appellate court in this case, yet then Thompson gives the appellate no argument or rationale for this statement. There is absolutely no caselaw or anything to support Thompson's contention that the harmless error doctrine should be applied. Anderson has pointed out this same problem with numerous claims of Thompson.

The harmless error doctrine is usually applied when the litigant appeals the decisions of the trial court and then the appellate court must decide if the error was specific enough to strike down the decision of the trial court. The doctrine of harmless error prevents unnecessary new trials when the error would not have affected the outcome.

Here, invoking the harmless error doctrine makes no sense. The issues the appellate court has been asked to examine are fairly narrow.

Thompson's first two statements under this section are clearly incorrect. He states, "The law applicable to appellate attorney fees are not in dispute." In support, Thompson has asked the appellate court to consider Oliekan and now under this point Thompson asks the Court to consider Glew v. Ohio Savings Bank, 181 P. 3d 791. Anderson has asked the appellate court to consider the Slattery and Cache County cases supporting her position.

Thompson also cites Oliekan and Glew to support his claims made in the second sentence under this argument, stating, "Thompson is entitled to fees on appeal if Thompson was entitled to fees at the trial court level." Once again, this is

an assertion made that is not supported even if the Court accepts Thompson's interpretation of the holdings of these cases.

Thompson further argues in this section that Anderson's claim is simply that, "this Court's failure to specifically identify appeal fees and costs leads to a result that those fees and costs are not recoverable." This leads one to believe that Anderson's sole issue is that it is the appellate court's fault for failure to elaborate or specify, and not Thompson's fault. This is simply not true because Anderson has previously set forth that Thompson did not inform the appellate court that he was seeking appellate fee reimbursement. Surely the last twelve words stated by Thompson prior to his conclusion in his initial brief from appeal #2 does not qualify as a proper request for relief, nor does the last four words of the conclusion in Thompson's Reply Brief from appeal #2. This same rationale can be used to refute Thompson's claim that Anderson is being hyper-critical.

Thompson seems to hang his hat on the Utah Supreme Court rulings in Glew. The problem with Glew is that there are facts from the Glew case that caused a favorable result for the party seeking appellate attorneys fees that are not present in Thompson. In Glew, the party requesting appellate attorney's fees had filed a petition for a rehearing with the Utah Supreme Court. The purpose of filing for a rehearing was for the sole purpose of seeking an award of attorney fees on appeal. The Utah Supreme Court treated the petition for rehearing as a motion to award attorney fees on appeal.

The same cannot be said of Thompson. No petition or motion has been filed. Thompson did not properly seek appellate attorney fees in appeal #2 and the district court on remand improperly awarded Thompson his appellate attorney fees anyway.

It is important to note that when the Utah Court of Appeals handed down its decision and ruling, Thompson did not distinguish between those attorney fees incurred as part of his order to show cause and his appellate fees. Thompson's attorney submitted his affidavit to the Court on January 12, 2009 claiming that attorney fees and costs totaled \$11,365.64 through June 30, 2008 (Record @ 587-589). Even though the Court of Appeals decision for Andersen II had been handed down for over one and a half months, Thompson made no attempt to distinguish between trial court fees and appellate fees despite the remand to have the trial court examine Thompson's "attorney fees and costs below".

Thompson states that Anderson's claims are really harmless error and hyper-critical. The reality is that huge amounts of money are on the line for Anderson even though the trial court awarded her approximately \$50,000 for child support and alimony arrearages among other amounts that she should have been paid over a several year period of time by Thompson. This does not take into account the numerous contempts of court that the trial court found and the appellate court upheld against Thompson.

The reversal entered by the Utah Court of Appeals in appeal #2, meant that the trial courts award of attorney fees in favor of Anderson in the amount of

\$5,329.65 (Record @ 399) was reversed. The decision of the trial court in the remand from appeal #2 in favor of Thompson totaled \$11,265.54 (Record @ 816). In all actuality, the decision of the appellate court in appeal #2 and the follow-up remand decision by the trial court took away \$16,595.19 from Anderson. In the last evidentiary hearing held in the case by the trial court, the court found that in February 2009, Anderson's monthly income had been static for the past eight years and her gross monthly income was \$728.00 (Record @ 726 and 727). The reality for Anderson was that this \$16,595.19 swing as determined by the Court had a devastating effect on her. By the time appeal #3 attorney fees are calculated the financial considerations on these issues reach approximately \$25,000.00.

APPELLEE'S ARGUMENT POINT #5

APPELLEE IS ENTITLED TO HIS
ATTORNEY'S FEES ON APPEAL

APPELLANT'S REPLY

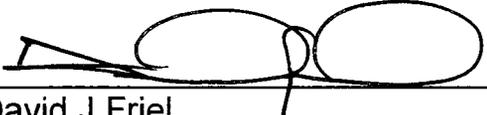
If the Utah Court of Appeals reverses the decision of the district court and does not allow Thompson his appellate fees for appeal #2, there is no justification for the appellate court to consider awarding Thompson his appeal attorney fees for this appeal.

CONCLUSION

The district court's decision to award Thompson his appellate attorney fees should be reversed. Anderson has properly sought for an award of appellate

attorney fees in this appeal, appeal #3, to correct the error of the trial court in awarding Thompson his fees in appeal #2. Anderson seeks a reversal of the district court order that Thompson be awarded \$7,463.01 for appellate attorneys fees incurred in appeal #2 and additionally seeks an order that she be awarded her appellate attorney fees for the costs of this appeal as she properly requested this relief in her initial brief. Thompson's request for appellate attorney fees for this appeal should be denied.

DATED THIS 12 day of July, 2010.



David J Friel
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing document on this 12 day of July, 2010 by United States mail, first class, postage pre-paid, to:

Bruce L. Richards, Esquire
P.O. Box 25786
Salt Lake City, UT 84125



AndersonL.apprply3